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91-1793

Supreme Court, U.S.
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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

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JAMES ALBERT COONES,
Petitioner

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI

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April 9, 1992

## QUESTIONS PRESENTED

1. Considering 11 U.S.C. §522(1) and Rule 4003(b) of the Federal Rules of Bankruptcy Procedure, are exemptions claimed by a debtor in a Title 11 proceeding deemed allowed if no party in interest objects within 30 days after the conclusion of the meeting of creditors?

2. Considering 11 U.S.C. §552, does a security interest covering all crops of a debtor extend to crops planted after a bankruptcy petition is filed when the secured creditor provided no funds to the debtor for the post-petition crops?

[**Note:** Petitioner reserves the right to argue Question 3 in the event certiorari is granted on the above questions, but does not include Question 3 among the reasons for the grant of certiorari.]

3. Is a security interest as to crops enforceable in a Title 11 proceeding when the

financing statement does not contain a legal description of the real property upon which the crops are grown, but instead only refers to another financing statement not attached there-to, which does contain a legal description?

## LIST OF PARTIES

The parties to the proceedings below are fully identified in the caption of the case.

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES ALBERT COONES,
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Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

---

Petitioner James Albert Coones respectfully prays that writ of certiorari issue to review the judgment and opinion of the United States Court of appeals for the Tenth Circuit, entered in the above-entitled proceeding on January 3, 1992.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 954 F.2d 596, and is reprinted in the appendix hereto, p. 4a, infra.

The memorandum decisions of the United States District Court for the District of Wyoming have not been reported. They are reprinted in the appendix hereto, p. 26a, infra.

The orders and memorandum decision of the United States Bankruptcy Court for the District of Wyoming have not been reported. They are reprinted in the appendix hereto, p. 95a, infra.

## JURISDICTION

Jurisdiction for this matter is found under 28 U.S.C. §§158 and 1254(1). This matter originated as Bankruptcy Case No. 88-05343-B in the United States Bankruptcy Court for the District of Wyoming.

The judgment and opinion of the United States Court of Appeals for the Tenth Circuit was entered on January 3, 1992 affirming the decisions of the United States District Court

for the District of Wyoming on consolidated appeals from the above-referenced Bankruptcy Court. The Court of Appeals denied a timely petition for rehearing by its Order entered February 14, 1992.

## STATUTES INVOLVED

11 U.S.C. §522(l) Exemptions.

The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

11 U.S.C. §552 Post-Petition Effect of Security Interest.

(a) Except as provided in subsection (b) of this section, property acquired by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

(b) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title [11 USCS §§363, 506(c), 522, 544, 545, 547 and 548], if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the proceeds, product, offspring, rents, or profits of such property, then such security interest extends to such proceeds, product, offspring, rents, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by

applicable non-bankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

F.R.B.P. 4003(b) Objections to Claim of Exemptions

The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the court. Copies of the objections shall be delivered or mailed to the trustee and to the person filing the list and the attorney for such person.

F.R.B.P. 9006(b)(3) Enlargement of Time

Enlargement limited. The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules.

Wyo. Stat. §1-15-102(a)(vi) (1987)

"Earnings" or "earnings from personal services" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, proceeds of any pension or retirement benefits or deferred compensation plan or otherwise.

Wyo. Stat. §1-15-408(a) and (b) (1987)

See Appendix hereto, p. 119a, infra.

## STATEMENT OF THE CASE

The Petitioners, James A. Coones and Cindy L. Coones, filed their Petition for relief under Chapter 11 of the Bankruptcy Code on October 20, 1988 in order to reorganize the financial affairs of their farming and ranching operation. The Petitioners completed their bankruptcy schedules and statements with the filing of their Schedule B-4 (Claim of Exemptions) and their Schedule of Consumer Debts Secured by Property of the Estate and Notice of Intentions on November 16, 1988. Relying upon Lingle State Bank v. Podolak, 740 P.2d 392, (Wyo. 1987), the Petitioners claimed as exempt, inter alia, personal service earnings in the amount of $30,816.43, pursuant to W.S. §1-15-101 et. seq. (1987) (which amount represents 75% of the funds held by Petitioners derived from wages and a pre-petition sale of cattle); and 75% of the value

of all livestock born after 1986 pursuant to W.S. §1-15-101 et. seq. (1987).

The meeting of creditors, pursuant to 11 U.S.C. §341, was held on December 8, 1988. No representative from the Respondent was present at this first meeting of creditors. No objection to any of the exemptions by the Petitioners was filed by any party in interest within thirty (30) days of the first meeting of creditors. In fact, no objection was ever filed.

On February 9, 1989 the Respondent filed its Motion to Prohibit Cash Collateral based upon the security agreements executed by Petitioners on May 16, 1986. These agreements provided Respondent's predecessor in interest with security interests as to:

> All farm products of Debtor, whether now owned or hereafter acquired, including but not limited to (i) all poultry and livestock and their young products thereof and produce thereof, . . .

Respondent also claims a security interest in all crops of the Petitioners; however, documents that Respondent relies upon for perfection of its interest either contain no legal description of the real property upon which the crops are grown or include the following pre-printed language on the form: "Description of Real Estate if above collateral is crops, growing or to be grown, timber, mineral (including oil or gas) or fixtures". Following this phrase has been typed in "Recorded on Financing Statement Dated May 16, 1986." The Financing Statement(s) referred to in this security agreement was not attached to the recorded Agreement.

The 1988 wheat crop planting was not completed until after the filing of the Chapter 11 Petition. All other crops of the Petitioners were planted in the following spring. Neither Respondent nor its

predecessor bank had advanced any funds for the planting of any crop of the Petitioners in 1988 or thereafter. (1986 was the last date any funds were received by the Petitioners from the bank subsequently taken over by the Respondent.) The means for purchasing fertilizer, seed, etc., came from other creditors or the Petitioners, themselves. No security agreement or other interest was renewed or granted to Respondent for the crops planted in 1988 and beyond.

As of the date of the Bankruptcy Petition, the only cattle still in the Petitioners' possession that had been purchased out of loan proceeds were the bulls. As of the date of the Bankruptcy Petition, all other livestock in existence when the loan was made in May of 1986 had been sold and those sale proceeds were applied to the loan, or the bank had allowed the sale proceeds to be applied to operation expenses. In 1988, but

prior to their bankruptcy filing, Petitioners sold most of the calves which were born in the spring of 1988. Most of the funds that were claimed as exempt derived from this livestock sale.

These proceeds were the main focus of Respondent's Motion to Prohibit Use of Cash Collateral and other related motions heard by the Bankruptcy Court on April 8, 1989 pursuant to the jurisdiction accorded it by 28 U.S.C. §157. The Bankruptcy Court found, for the purpose of the contested issues concerning Petitioners' exemption claim, that:

> . . . [T]he position is so extreme to claim 75 percent in all of this money and all this personal property, that it just -- the Court simply will not allow it. Whether or not it's -- it was in time or not, the fact is that this is not an exemption the Court will allow. (Tr. at 9.)

Accordingly, the Bankruptcy Court granted Respondent's Motion to Prohibit Use of Cash Collateral insofar as it related to livestock

and harvested crop proceeds. However, it denied the motion insofar as it related to the growing crops due to the absence of a proper legal description in the security agreements.

Both parties appealed the Bankruptcy Court's orders to the United States District Court for the District of Wyoming. Jurisdiction lies in the District Court by reason of 11 U.S.C. §158(a). The District Court certified to the Wyoming Supreme Court questions involving, inter alia, whether Petitioners' exemption claims would be recognized under Wyoming law. The Wyoming Supreme Court determined that Podolak, supra., no longer applied to ranchers' and farmers' exemption claims for personal earnings from the products and proceeds of their crops and livestock. Coones v. Federal Deposit Ins. Corp., 796 P.2d 803 (Wyo. 1990). Thereafter, the District Court affirmed the Bankruptcy Court's ruling concerning Petitioners' claims

of exemption by determining that, even though no timely objection to the exemption claims was made, Petitioners had no legal basis for the personal service earnings exemption claims and, therefore, they are not entitled to the exemption . The District Court also found support for the affirmance of the Bankruptcy Court Order by finding the list of exemption claims was not filed within fifteen (15) days of the petition filing date.

The Respondent's lien claim against Petitioners' pre-petition and post-petition crops was reinstated by the reversal of the Bankruptcy Court's ruling by the District Court. The District Court found that even though the crops at issue were no longer in existence, the case was not moot. Further, the District Court reversed on the basis that a security agreement against crops can incorporate by reference a legal description contained in a separate and unattached

document. The most important aspect of the decision was the determination that crops planted post-petition are "proceeds" as that term is used in 11 U.S.C. §552(b):

> The Appellees' argument that 11 U.S.C. Section 552 eliminates the lien on the post-petition crops does not take into account the fact that the Debtor used the proceeds from the FDIC's pre-petition crops to create the post-petition property. Consequently, under 11 U.S.C. Section 552(b), the post-petition crops are, for all intents and purposes, proceeds to which the FDIC security interest attaches.

Order on Appellants' Crops' Security Interest Appeal at 18 (see Appendix hereto at p. 60a, infra).

Appeals of these orders were taken to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. §158(d). The appeals were consolidated and thereafter affirmed by its Decision entered January 3, 1992. Relying upon Sherk v. Texas Bankers Life & Loan Ins. Co., 918 F.2d 1170 (5th Cir.

1990), the Tenth Circuit affirmed the District Court's decision on the exemption appeal by holding that the time limits specified in Rule 4003(b) will not apply unless the claimed exemption has a valid statutory basis.

That Court also found that crops planted post-petition were subject to a pre-petition security agreement because the crops "were produced with proceeds of debtors' pre-petition crops, proceeds in which the FDIC's security interest continued after initiation of bankruptcy proceeding". (See Appendix hereto at p. 23a, infra.) (Please note that the factual determination as to the source of financing of post-petition crops first appeared in the District Court's Order on Appellants' Crops' Security Interest Appeal.)

The Tenth Circuit further adopted the view that, to have a perfected security interest in crops, a creditor need not provide a legal description in the body of the

instrument so long as reference is made to another instrument that contains the legal description.

On February 14, 1992 the Tenth Circuit entered its Order denying the Petition for Reconsideration/Rehearing and Suggestion for En Banc Consideration.

## REASONS FOR GRANTING THE WRIT

### I.

**The Tenth Circuit's interpretation of F.R.B.P. 4003(b) and 11 U.S.C. §522(l) (a) abrogates any effective time limits for objections and (b) conflicts with decision of other Circuits.**

In stark contrast to the reasoning underlying Taylor v. Freeland & Kronz, 938 F.2d 420 (3rd Cir. 1991), cert. granted, 112 S.Ct. 632 (Nov. 27, 1991), the Tenth Circuit apparently has chosen to adopt the approach represented by Sherk v. Texas Bankers Life & Loan Ins. Co., 918 F.2d 1170 (5th Cir. 1990). The Fifth Circuit requires that, before the time limits

for objecting to a claimed exemption will apply, the claimed exemption must have a valid statutory basis. A middle ground between the Third Circuit and the Tenth Circuit is followed in the Sixth Circuit which applies a standard that the exemption must have a good faith basis in state law. Munoz v. Dembs, 757 F.2d 777 6th Cir. 1985).

Taylor represents the better reasoned view in this area since the time limits specified in Rule 4003(b) help effectuate the public policy of finality, prompt distribution of assets to creditors as well as helping to effectuate the goal of "fresh start" for bankruptcy petitioners. Lines v. Frederick, 400 U.S. 18, 19 (1970). The effect of the Tenth Circuit's ruling in the instant case is to grant a de facto extension of time allowing trustees and creditors to have unlimited time to challenge exemptions. Any enlargement of time must conform to F.R.B.P. 9006(b)(3). The

time limits contained in this rule are strictly enforced. In re Brayshaw, 912 F.2d 1255, 1256 (10th Cir. 1990); Arevalo v. Woods, 811 F.2d 487 (9th Cir. 1987).

The Tenth Circuit has thus created a precedent directly in conflict with F.R.B.P. Rule 4003(b) and 9006 that will have the effect of rendering the 30-day time limit in Rule 4003 meaningless, creating unneeded litigation and hindering the prompt administration of bankruptcy estates.

## II.

### The Tenth Circuit's extension of pre-petition liens to post-petition assets (a) creates confusion and (b) conflicts with decisions of other Circuits.

By the decision in the instant case, the meaning of the term "proceeds" as used in 11 U.S.C. §552(b) has been impermissibly broadened into a vague and confusing standard that would seem to allow the extension of a

pre-petition lien to assets acquired post-petition if there is even the possibility that the acquisition or creation of the post-petition asset was even made remotely possible by a pre-petition loan. From a practical standpoint, the Tenth Circuit decision blurs the distinction between "after-acquired property" and "proceeds". The implication of the precedent set by the instant case is to allow the subsection (b) exceptions to the general rule promulgated by 11 U.S.C. §552(a) to subvert the intent of §552(a) and in effect make §552(b) the general rule. Adding to the dire implications of this approach is the fact the word "crops" nowhere appears in the §552(b) exceptions.

The Tenth Circuit's liberal interpretation of the term "proceeds" appears to conflict with the positions taken by other Circuit Courts of Appeals. See In re Bering Trader, Inc., 944 F.2d 500 (9th Cir. 1991); In

re Jones, 908 F.2d 859 (11th Cir. 1990. Indeed insofar as the issue is narrowed to post-petition crops, the instant decision flies in the face of the overwhelming majority position as reflected by such cases as In re Smith, 119 B.R. 558 (S.D. Ohio, 1989); Bird v. Plains State Bank, 86 B.R. 660 (D. Kan. 1988); In re Wallman, 71 B.R. 125 (Bankr. D. S.D. 1987); In re Drewes, 68 B.R. 153 (Bankr. N.D. Iowa 1986); In re Lorenz, 57 B.R. 734 (Bankr. N.D. Ill. 1986); In re Hamilton, 18 B.R. 868 (Bankr. D. Colo. 1982).

In expanding the reach of §552(b) proceeds exception, the Tenth Circuit relies upon In re J. Catton Farms, Inc. v. First Nat'l. Bank, 779 F.2d 1242 (7th Cir. 1985), but that case did not deal with post-petition crops, but governmental contract payments (payment in kind proceeds) arising from a pre-petition contract. The Tenth Circuit has taken a dangerous step in diluting the purpose

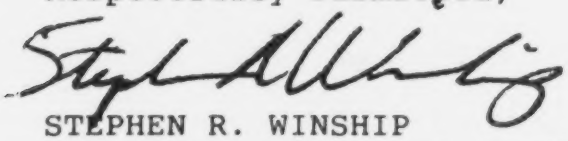
of §552(a) by treating a security interest in a pre-petition contract in a similar fashion as a pre-petition security interest in crops.

Without some clarification concerning the reach of the proceeds exception to §552(a), a "Pandora's box" is opened whereby pre-petition secured creditors, no matter how distant from the planting of the contested crops, can now apparently claim a lien against post-petition crops through an alleged tracing of proceeds or indirect benefits therefrom. Plenary consideration of the matter by this Court is essential.

## CONCLUSION

For these various reasons, this Petition for Certiorari should be granted. In the alternative, determination to grant the writ should be deferred until this Court renders its opinion in Taylor v. Freeland & Kronz, supra.

Respectfully submitted,



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## APPENDIX


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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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|---|---|---|
| IN RE: JAMES ALBERT COONES and CINDY LEE COONES, f/k/a Cindy Lee Jones, Debtors, | ) | |
| FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver of STOCKMEN'S BANK AND TRUST COMPANY, and liquidator of FIRST NATIONAL BANK OF SHERIDAN, Appellee, | ) | |
| v. | ) | No. 90-8113 & 90-8114 |
| JAMES ALBERT COONES, CINDY LEE COONES, f/k/a Cindy Lee Jones, Appellants. | ) | |

ORDER
Entered February 14, 1992

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Before MCKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, AND EBEL, Circuit Judges.

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This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

s\Robert L. Hoecker
ROBERT L. HOECKER, Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

| | | |
|---|---|---|
| In re: JAMES ALBERT COONES and CINDY LEE COONES, f/k/a Cindy Lee Jones, Debtors. | ) | |
| FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver of STOCKMEN'S BANK AND TRUST COMPANY, and liquidator of FIRST NATIONAL BANK OF SHERIDAN, Appellee, | ) | |
| v. | ) | No. 90-8113 & 90-8114 |
| JAMES ALBERT COONES; CINDY LEE COONES, f/k/a Cindy Lee Jones, Appellants. | ) | |

Appeals from the United States District Court for the District of Wyoming (D.C. Nos. C89-0242-K & 89-243-K)

Submitted on the briefs:

Stephen R. Winship, Casper, Wyoming, for appellants.

Jeanne R. Lee, Senior Attorney-Bankruptcy, Federal Deposit Insurance Corporation, Denver, Colorado, and Thomas M. Hogan, Casper, Wyoming (Of Counsel: Ann S. DuRoss, Assistant General Counsel; Joan E. Smiley, Senior Counsel; Edward J. O'Meara, Counsel, Federal Deposit Insurance Corporation, Washington, D.C.) for appellee.

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Before LOGAN, MOORE and BALDOCK, Circuit Judges.

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LOGAN, Circuit Judge.

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In these two appeals from Chapter 11 bankruptcy proceedings, debtors appeal district court decisions (1) determining that the appellee Federal Deposit Insurance Corporation (FDIC) possessed an enforceable security interest in debtors' crops (appeal No. 90-8113); and (2) denying debtors' motion, made pursuant to 11 U.S.C. § 522(f), to avoid the FDIC's liens in debtors' post-1986 crops and livestock (appeal No. 90-8114). This court will review the bankruptcy court's factual findings under a clearly erroneous

standard, but we will review the district court's legal determinations de novo. Dalton Dev. Project #1 v. Unsecured Creditors Comm. (In re Unioil), No. 90-1111, slip op. at 6 (10th Cir. Nov. 4, 1991). Upon careful consideration of debtors' arguments on appeal, we affirm.[1]

In 1986, debtors and Stockmen's Bank & Trust Company (Stockmen's) entered into two loan transactions. Along with two promissory notes, debtors executed security agreements which gave Stockmen's a secured interest in, among other things,

> "FARM PRODUCTS: All farm products of the [debtors], whether now owned or hereafter acquired including but not limited to (i) all poultry and livestock and their young, products thereof and produce thereof, (ii) all crops, whether annual or perennial, and the products thereof. .

[1] After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9. The cases are therefore ordered submitted without oral argument.

> In addition to any property generally described above, the following Collateral:
>
> ALL INVENTORY OF CATTLE, HORSES, AND ALL OTHER LIVESTOCK, ALL FARM PRODUCTS OF CATTLE, HORSES, AND ALL FARM EQUIPMENT AND MACHINERY, OTHER EQUIPMENT AND MACHINERY, INVENTORY, FARM PRODUCTS, HAY, GRAIN, CROPS, CROP INVENTORY AND CROP FARM PRODUCTS, VEHICLES, ACCOUNTS, CONTRACT RIGHTS, OR GENERAL INTANGIBLES ARISING FROM THE SALE OR DISPOSITION OF PRODUCTS THEREOF NOW OWNED OR HEREAFTER ACQUIRED AND WHEREVER LOCATED."

Appellee's Supp. App. at 231; see also id. at 239.

In October 1988, debtors jointly filed for Chapter 11 bankruptcy relief. On their bankruptcy schedules, debtors listed as exempt property, see generally 11 U.S.C. § 522, inter alia, seventy-five percent of their livestock acquired and their crops grown after 1986. Debtors asserted this property was exempt as personal service earnings under Wyoming law. No timely objection to the exemption was filed by any interested party.

In February, 1989, the FDIC filed a motion to prohibit debtors' use of cash

collateral. See generally 11 U.S. C. § 363(e). Later in February 1989, debtors filed an application to avoid the FDIC's liens impairing the claimed exempt property.

Following a hearing, the bankruptcy court denied debtors' claimed exemptions, despite the lack of a timely objection, ruling the exemptions had no valid state law basis. See Appellants' App., doc. 1, 9-10. In a subsequent order dated June 26, 1989, the bankruptcy court denied the FDIC's motion to prohibit use of cash collateral, but only as to the FDIC's interest in debtors' crops, ruling that the FDIC did not have an enforceable security interest in debtors' crops. See Appellants' App., doc. 2, 4-7. The bankruptcy court granted the FDIC's motion to prohibit use of cash collateral insofar as it pertained to "cash collateral which is not the proceeds of the debtors' crops." Appellee's Supp. App. at 184-85.

The parties filed cross-appeals from the bankruptcy court determinations. The district court certified the question of the validity of debtors' claimed exemptions under Wyoming law to the Wyoming Supreme Court. See Appellee's Supp. App., 1-4. The Wyoming Supreme Court determined debtors' personal service earnings exemption had no valid basis under Wyoming state law. Coones v. FDIC, 796 P.2d 803, 806 (Wyo. 1990).

The district court then determined that, in light of the Wyoming Supreme Court decision, debtors were not entitled to the personal service earnings exemption, even though the FDIC had failed to object to that exemption in a timely manner. Coones v. FDIC, No. C-89-243-K, Order on Appellants' Exemption Appeal (D. Wyo. Dec. 5, 1990). In another order also dated December 5, 1990, the district court reversed the bankruptcy court determination that the FDIC did not have an enforceable security interest in debtors'

crops. Coones v. FDIC, No. C89-242-K, Order on Appellant's Crops' Security Interest Appeal (D. Wyo. Dec. 5, 1990). Debtors appeal from both of these district court determinations.

I

The first issue presented is whether the lack of a timely objection to debtors' claimed exemption precluded the bankruptcy court from denying that exemption, even though the exemption has no valid state law basis.[2] Section 522, however, contains an implicit requirement that the claimed exemption have a valid statutory basis. See, e.g., Sherk v. Texas Bankers Life & Loan Ins. Co. (In re

[2] Bankruptcy Rule 4003(b) requires that any trustee or creditor may file an objection to a claimed exemption within thirty days after the conclusion of the meeting of creditors or the filing of any amendment to the listed exemptions. Rule 4003(b) further provides that the bankruptcy court may only extend the time to file a objection if the extension is requested with the original time for filing the objection. See also Clark v. Brayshaw (In re Brayshaw), 912 F.2d 1255, 1256-57 (10th Cir. 1990). The parties do not dispute the lack of a timely filed objection.

Shark), 918 F.2d 1170, 1174-75 (5th Cir. 1990). The lack of a timely objection will not preclude the bankruptcy court's exercise of its authority to deny an exemption that has no legal basis. See, e.g., id. But see Taylor v. Freeland & Kronz, 938 F.2d 420, 423 (3 d Cir.), cert. granted, 112 S. Ct. 632 (Nov. 27, 1991) (lack of timely objection precludes bankruptcy court's exercise of its authority to deny an exemption).

Debtors argue that this court should adopt the Sixth Circuit's conclusion in Munoz v. Dembs (In re Dembs), 757 F.2d 777 (6th Cir. 1985), that failure to object to a claimed exemption that has a good faith basis in state law will conclusively establish the debtor's exemption. See id. at 780; see also Halverson v. Peterson (In re Peterson), 920 F.2d 1389, 1392-94 (8th Cir. 1990) (debtor can overcome late objection only if exemption appeared in good faith to have been valid). Even under Dembs' good faith analysis, debtors' argument

fails because their claimed exemption lacked a good faith basis under Wyoming law.

In claiming their exemption, debtors relied upon the Wyoming Supreme Court decision in Lingle State Bank v. Podolak, 740 P.2d 392 (Wyo. 1987). Podolak, however, addressed a prior state statute that did not apply to debtors' claims, see Coones, 796 P.2d at 804-05, and which has been rewritten so that a "present comparison is . . . impracticable," Podolak, 740 P.2d at 394 n.1. Recognizing this, the Podolak court acknowledged that its decision "is consequently circumscribed in future application." Id. Therefore, debtors' claimed exemption, based upon the Wyoming Supreme Court's decision in Podolak, did not have a good faith basis in Wyoming law.

II

Debtors next argue that the FDIC did not have an enforceable security interest in debtors' crops because the security agreements failed to include a description of the

property on which the crops were grown. Wyoming law controls the determination of the validity of the liens. See In re Martin Grinding & Mach Works, Inc., 793 F2d 592, 594 (7th Cir. 1986).

To create an enforceable security interest, Wyoming law requires, inter alia, a security agreement, signed by the debtor, which contains a description of the collateral. Wyo. Stat. § 34.1-9-203(a)(i). If the collateral includes crops, growing or to be grown, the security agreement must also include a description of the land concerned. Id.; see also Citizens Nat'l Bank & Trust Co. v. Serelson (In re Burkart Farm & Livestock), 938 F.2d 1114, 1115 (10th cir. 1991).

The security agreements in the instant case did not include a description of the land upon which debtors' crops were growing or were to be grown. Rather, in the section on the security agreements designated as "Description of real Estate if above Collateral is crops,

growing or to be grown," the security agreements included the language "RECORDED ON FINANCING STATEMENT DATED MAY 16, 1986." Appellee's Supp. App., 231; see also id. at 239. Thus, the security agreements did specifically refer to the description of land included in the financing statements filed by Stockmen's to perfect its liens in these crops.

Debtors argue, however, that the land description must be included in the security agreement and, therefore, reference to the financing statements cannot provide the necessary land description. We disagree. A security agreement need not be evidenced by a single document, but may be established through consideration of two or more written documents. Looney v. Nuss (In re Miller), 545 F2d 916, 918, n.4 (5th Cir.) (applying Texas law), cert. denied, 430 U.S. 987 (1977); see also, e.g., Royal Bank & Trust Co. v. Pereira (In re Lady Madonna Indus., Inc.), 99 B.R.

536, 542 (S.D.N.Y. 1989) (composite document theory of security agreements permits finding security agreement through various loan documents) (dicta), and cases cited therein. It is appropriate to refer to other documents to establish the security interest unless the security agreement is facially complete and does not refer to any other documents. See In re Lady Madonna Indus., 99 B.R. at 542.

The security agreements at issue in these appeals clearly incorporated the land description included in the financing statements. Reference to the financing statements to establish the FDIC's security interests, therefore, was not erroneous. See Longtree, Ltd. v. Resource Control Int'l, Inc., 755 P.2d 195, 203-04 (Wyo. 1988) (subsequent, unsigned document describing additional collateral may be considered in establishing security interest created by original security agreement, if documents express some internal connection with one

another); cf. Maxl Sales Co. v. Critiques, Inc., 796 F2d 1293, 1298 (10th Cir. 1986) (applying Kansas law) (security agreement incorporated by reference consignment agreement); Pontchartrain State Bank v. Poulson, 684 F2d 704, 707 (10th Cir. 1982) (applying Oklahoma law) (documents, considered separately or taken as a whole, did not satisfy requirements of Oklahoma U.C.C. § 9-203).

The authorities debtors cite for the proposition that a security agreement may not be expanded by reference to the financing statement are inapposite. Those cases addressed situations where the creditor attempted to correct a deficiency in the security agreement's description of collateral by referring to the financing statement, even thought the security agreement did not specifically incorporate the description of the collateral in the financing statement by reference. See, e.g., Mitchell v. Shepherd

Mall State Bank, 458 F.2d 700, 702-04 (10th Cir. 1972) (applying Oklahoma law); In re Martin Grinding, 793 F.2d at 594-95 (applying Illinois law).

Debtors next argue that the FDIC's security interest in debtors' crops is not enforceable because the security agreements' description of the land, incorporated from the financing statements, was insufficient. "[A]ny description of . . .real estate is sufficient whether or not it is specific if it reasonably identifies what is described." Wyo. Stat. § 34.1-9-110.

> "The test of sufficiency of a description laid down by this section is that the description do the job assigned to it - That it make possible the identification of the thing described. Under this rule courts should refuse to follow the holdings . . .that the descriptions are insufficient unless they are of the most exact and detailed nature . . . ."

Wyo. Stat. § 34.1-9-110 Official Comment.

The financing statements described the land by range, township and section. See Appellee's Supp. App., 245, 246. Although a

legal description of the land is not required, cf. In re McMannis, 39 B.R. 98, 100 (Bankr. D. Kan. 1983) (applying Kansas U.C.C. § 9-110), the Wyoming Supreme Court, in addressing a similar issue, noted that "[t]he cautious creditor cannot go wrong by using a section-township legal description, so long as it is accurate." Landen v. Production Credit Ass'n, 737 P.2d 1325, 1329 (Wyo. 1987) (quoting United States v. Collingwood Grain, Inc., 792 F.2d 972, 975 (10th Cir. 1986) (quoting Kansas Comment to Kan. Stat. Ann. § 84-9-402)).

Debtors, however, assert that the legal description in the financing statements is in error because, in addition to describing debtors' property, the legal description includes land belonging to adjoining land owners. Failure to specify the particular pieces of a section on which the crops are growing or will be grown, however, will not destroy an otherwise sufficient land description. Cf. Collingwood, 792 F.2d at 974-

75 (land description indicating crops growing on 160-acre tract in a particular section, but not precisely indicating location of 160-acre tract within that section, was sufficient description of land). The land descriptions contained in the financing statements are sufficient to identify debtors' property upon which the crops were grown.

III

Finally, debtors argue that, in any event, the FDIC's secured interest in post-petition crops was extinguished by the bankruptcy filing. Debtors rely upon 11 U.S.C. § 552 (a), which provides that "[e]xcept as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." Subsection (b), however, with exceptions not relevant here, provides that

> "if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, . . .then such security interest extends to such proceeds, . . .acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable non-bankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise."

11 U.S.C. § 552 (b).

The district court correctly determined that, because the post-petition crops were produced with the proceeds of debtors' pre-petition crops, proceeds in which the FDIC's security interest continued after initiation of bankruptcy proceedings, § 552 did not extinguish the FDIC's secured interest in the post-petition crops. See J. Catton Farms, Inc. v. First Nat'l Bank, 779 F.2d 1242, 1244, 1246-47 (7th Cir. 1985) (applying § 552 (b) to use of proceeds of pre-petition crop collateral, including government payments not

to grow crops, to produce post-petition crops) (dicta).

> "[W]hen a secured party has a pre-petition security interest in a crop in Year 1, its security interest extends to the post-petition proceeds of that crop as well as to the post-petition crop in Year 2 and its proceeds if the Year 2 crop is financed with the proceeds of the Year 1 crop."

Unsecured Creditors Comm. v. Marepcon Fin. Corp. (In re Bumper Sales, Inc.), 907 F.2d 1430, 1439 (4th Cir. 1990) (dicta).

Debtors argue that "[t]here is no evidence in the appeal record that any proceeds were . . .used . . .'to create the post-petition crops.'. . . For the District Court to rely on such a position, it should have remanded the matter for further findings." Appellants' Reply Br. at 9. In support of this argument, however, debtors assert only that "as a practical matter it is rather doubtful that monies advanced in May, 1986 were used to create a winter wheat crop planted in late 1988." That allegation is not

sufficient to compel this court to reverse the district court's determination.

The parties' remaining arguments lack merit. The judgments of the United States District Court for the District of Wyoming are, therefore, AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

| | | |
|---|---|---|
| FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of the Stockmen's Bank and Trust Company and as Liquidator for the First National Bank of Sheridan, Wyoming, | ) | |
| Appellant/Creditor, | ) | |
| v. | ) | No. C89-242-K |
| JAMES ALBERT COONES and CINDY LEE COONES, f/k/a Cindy Lee Jones, | ) | |
| Appellees/Debtors. | ) | |

ORDER ON APPELLANT'S CROPS' SECURITY INTEREST APPEAL

This matter came before the Court on Appellant/Creditor's appeal from an order entered by the United States Bankruptcy Court for the District of Wyoming in a case entitled In re: James Albert Coones and Cindy Lee Coones, Case No. 88-05343-B. Timely Notice of Appeal was filed on July 6, 1989 from the final Order of the Bankruptcy Court. The issue as presented by the Appellant is whether the Bankruptcy Court erred in its decision

that the FDIC does not have a perfected security interest in the Debtors' crops.

DISCUSSION

The Bankruptcy Court in its June 26, 1989 "Order Denying In Part and Granting In Part the FDIC's Motion to Prohibit Use of Cash Collateral" denied the FDIC's request to prohibit the use of cash collateral only insofar as the request pertained to proceeds of the Debtors' crops. The Court stated, in its decision accompanying the Order, that:

> "In this case, the Security Agreements, which are the documents which would create the security interest, do not contain an adequate description of the land covered in connection with crops as required by Section 34-21-922."

The Debtors owe the Appellant, FDIC, as Liquidator for the First National Bank of Sheridan, Wyoming and as Receiver for Stockmen's Bank and Trust Company of Gillette, Wyoming, a debt in excess of $700,000.00 secured by collateral the value of which is approximately $450,000.00.

The FDIC, as the Receiver of Stockmens Bank and Trust Company is the holder of two notes from the Debtors set forth in documents entitled "Promissory Note and Security Agreement". Both Notes were executed on May 16, 1986 and have the principal amounts of $400,000.00 and $70,017.00. (The FDIC, as Liquidator of the First National Bank of Sheridan, is also the holder of two (2) notes from the Debtors in the approximate amount of $45,000.00 and $50,000.00 secured by real estate plus oil and gas equipment, but these notes and security interests have never been disputed.) The Stockmen's Notes and accompanying commercial paper, as presented by the Appellant, are outlined as follows:

$400,000.00 NOTE-"BUSINESS; RENEWAL AND PURCHASE"

Promissory Note and Security Agreement (Appellant's Exhibit A)

Financing Statement, Campbell County Clerk Real Estate Records, "All Farm Products. . ." with legal description (Appellant's Exhibit B)

Financing Statement, Campbell County Clerk, "All Farm Products . . ." (Appellant's Exhibit C)

Financing Statement, Secretary of State, "All Farm Products. . ." with legal description (Appellant's Exhibit D)

Financing Statement, Campbell County Clerk, "All Inventory of Cattle. . ." (Appellant's Exhibit E)

Financing Statement, Secretary of State, "All Inventory of Cattle. . ." (Appellant's Exhibit F)

Certificate of Title, 1st and 2nd Liens, typical of all vehicles (Appellant's Exhibit N)

$70,017.00 NOTE-"BUSINESS; OPERATING"

Promissory Note and Security Agreement, (Appellant's Exhibit G)

Financing Statement, 2nd Lien, Campbell County Clerk, "All Farm Products. . ." with legal description (Appellant's Exhibit H)

Financing Statement, 2nd Lien, Campbell County Clerk, "All Farm Products. . ." (Appellant's Exhibit I)

Financing Statement, 2nd Lien, Secretary of State, "All Farm Products. . ." with legal description (Appellant's Exhibit J)

Financing Statement, 2nd Lien, Campbell County Clerk, "All Inventory of Cattle ..." (Appellant's Exhibit K)

Financing Statement, 2nd Lien, Secretary of State, "All Inventory of Cattle..." (Appellant's Exhibit L)

Security Agreement, additional to Exhibit G Above, (Appellant's Exhibit M)

Certificate of Title, 1st and 2nd Liens, typical of all vehicles (Appellant's Exhibit N)

There is no dispute as to the existence or the authenticity of the two Promissory Notes, their integral Security Agreements and their related Financing Statements. These documents are a matter of the public record. All of the documents were executed by the Debtors and were filed with the appropriate recording office as is designated on the exhibits in accordance with Wyoming Statutes.

The Debtors gave Stockmen's Bank and Trust two documents, each entitled "Promissory Note and Security Agreement". Each of these Promissory Notes granted the Bank two separate and distinct security interests; (1) the $400,000.00 Note is secured by a real estate Mortgage (a second Mortgage on the property

possibly having no remaining equity) and a Security Agreement and (2) the $70,017.00 Note having two separate Security Agreements, one contained within the body of the "Promissory Note and Security Agreement" and the other being a separate document altogether. The security agreement contained within the body of the "Promissory Note and Security Agreement" relates to the crops and describes the real estate by reference to a Financing Statement of a date even therewith, notwithstanding the fact that the Financing Statement served a dual role as the document describing the property for the purpose of the Security Agreement plus its statutory role as a Financing Statement. The property upon which the crops were located is described, subscribed and acknowledged by the Debtors. The Security Agreements therefore are enforceable and attached to the collateral.

The Appellees request that this Court review the record to determine whether or not

a security agreement exists between the Debtors and the FDIC. As relied upon by the Bankruptcy Court before, this argument centers around Landen v. PCA of Midlands, 737 P.2d 1325 (Wyo. 1987) and the Wyoming Uniform Commercial Code; specifically Article 9, Secured Transactions, WSA Sections 34.1-9-101, et seq.

The uncontroverted evidence below shows that there were two documents entitled "Promissory Note and Security Agreement", given by the Debtors to the Stockmen's Bank and Trust Company of Gillette, one in the amount of $400,000.00 and one in the amount of $70,017.00, (Appellant's Appendix Exhibits "A" and "G"). A careful review of both these documents reveals that each Promissory Note is secured by the Security Agreement appearing on the face of the Promissory Note. The $70,017.00 Note, in addition, has a separate Security Agreement given for the Promissory Note (Appellant's Appendix Exhibit "M").

Therefore, the two obligations to pay the Bank are each secured by two separate and distinct security interests; one being contained within the body of the Promissory Note and the other being a separate document (a second Mortgage with the $400,000.00 note and a separate Security Agreement on the $70,017.00 note). This discussion focuses on the Security Agreements between the Debtors and the Bank contained within the body of each "Promissory Note and Security Agreement" as the issue addressed by the Bankruptcy Court is contained within these Security Agreements; that issue being whether or not there is a security interest granted the Bank by the Debtors in the Debtors' crops.

A review of each of the Promissory Notes shows that the Debtors, James A. Coones and Cindy L. Coones, both executed the Agreements which, on their face, granted the Bank a security interest in, among other things, the Debtors' "crops, crop inventory, and crop farm

products" (Appellant's Appendix Exhibit "A" and Exhibit "G"). At the bottom right-hand corner of each of the "Promissory Note and Security Agreements" is a box in which the description of the real estate on which the crops are grown is to be inserted. The land is described as "Recorded on Financing Statement Dated May 16, 1986". These Financing Statements (Appellant's Appendix Exhibits "B", "D", "H", and "J"), filed with the "Campbell County Clerk, Real Estate Records" and the Wyoming Secretary of State, clearly show the legal description of the property upon which the crops are grown.

The Appellant's position is that the security interest attached to the crops pursuant to the "Promissory Note and Security Agreements" in that the description of the real estate was incorporated into the Security Agreement on its face by reference to the Financing Statement. Although the documents entitled "Promissory Note and Security

Agreement" and the Financing Statements are two separate documents, it is clear from the record that the intent of the parties was to describe the real estate by reference to the Financing Statement notwithstanding the separate legal purpose of the Financing Statement. These Financing Statements were also executed by the Debtors and describe the Debtors' property upon which the crops were grown. The Debtors have never disputed this. Therefore, each "Promissory Note and Security Agreement", on its face, coupled with its reference to the legal description of the real property upon which the crops were grown in the Financing Statement, constitutes the entire Security Agreement granting the security interest in the Debtor's crops. Although the Financing Statement does serve a separate legal purpose in secured transactions, it is clear that the Financing Statement is incorporated into the Security

Agreement for the purposes of describing the real estate upon which the crops were grown.

> "The security agreement is the contract between the parties;..." Landen v. Production Credit Association, supra, at 1325, quoting American Restaurant Supply Company v. Wilson, Fla. App., 371 So.2d 489, 490 (1979) (emphasis in original)

The Wyoming Uniform Commercial Code provides:

> "In this article unless the context otherwise requires:
>
> **********
>
> "(xii) "Security Agreement means an agreement which creates or provides for a security interest;"***

Section 34-21-905 (a)(xii), W.S. 1977

> [A] security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:
>
> (i) The collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned;..."

Section 34-21-922 (a)(i), W.S. 1977 (1988 Cumm. Supp.) (emphasis added).

> "For the purposes of this article, any description of personal property or

> real estate is sufficient whether or not it is specific if it reasonably identifies what is described."

Section 34-21-910, W.S. 1977.

Regarding the Wyoming Uniform Commercial Code, the record shows that (1) there are two Security Agreements covering the crops between the Debtors and the Bank spelled out specifically on the face of each "Promissory Note and Security Agreement", and (2) the security interest is enforceable and has attached in that each of these Security Agreements have been signed by the Debtors, they contain a description of the collateral and, finally, they contain an acknowledged and subscribed description of the land which is incorporated into the Security Agreements by reference to the Financing Statements. The description of the land concerned, in accordance with W.S.A. § 34-21-910, is sufficient because it reasonably identifies what is described.

"It has also been said that:

> "[T]he cautious creditor cannot go wrong by using a section-township legal description, so long as it is accurate." Id. at 975, quoting Kansas Comment to Kan. Stat. Ann. Section 84-9-402, which discusses Chanute Production Credit Association v. Weir Grain & Supply, Inc., 210 Kan. 181, 499 P.2d 517 (1972)." Landen v. Production Credit Association, supra, at 1329.

The description of the real estate as set forth in the Financing Statements referenced in the Security Agreements is accurate as far as the record shows. It is based on information acknowledged and subscribed to by the Debtors. It must be assumed for the sake of this case that the legal description in the Financing Statements referred to by the Security Agreements is, for all intents and purposes, correct.

The contents of the Security Agreements at issue in this case are contained not only on the face of each of the "Promissory Note and Security Agreement" but in the legal description of the lands involved contained in the Financing Statement which is incorporated

by reference in the Security Agreement. It has been stated that, if there is more than one writing and all of the writings are signed by the party to be charged (in this case, the Debtors) and it is clear by their contents that they relate to the same transaction, there are no problems present in interpreting the intent of the parties as set forth in their agreement. See Foreman v. Gadouas, 247 Mass. 207, 142 N.E. 87 (1924); Jennings v. Ruidoso Racing Ass'n, 79 N.M. 144, 441 P.2d 42 (1968).

As a general proposition,

> "incorporation by reference is generally effective to accomplish its intended purpose where... the provision to which reference is made has a reasonably clear and ascertainable meaning." J.S. & H. Constr. Co. v. Richmond County Hosp. Auth., 473 F.2d 212, 215 (5th Cir. 1973).

Thus, documents that are effectively incorporated by reference into an agreement become as much a part of the contract between the parties as the document they sign. Turner Constr. Co. v. Midwest Curtainwalls, Inc., 187

Ill. App 3d 417, 135 Ill Dec. 14, 543 NE2d 249 (1989); Teign Constr., Inc., v. Pavement Specialists, Inc., 267 NW2d 574 (SD 1978); Kilbourne-Park Corp. v. Buckingham, 404 P.2d 244 (Wyo 1965); Harper v. Home Idem. Co., 140 So 2d 653 (La App 1962); Johnston Bros., Inc., v. Village of Coopersvile, 261 Mich 26, 246 NW 551 (1932); 17A C.J.S., Contracts Section 299.

No specific language is necessary to incorporate an extraneous document by reference. See First Nat'l Bank Lexington, Tenn. v. United States, 12 Cl. Ct. 719 (1987), rev'd on other grounds, 846 F.2d 740 (Fed. Cir. 1988), cert denied, 109 S.Ct. 231, 102 L Ed 2d 221 (1988); United Cal. Bank v. Prudential Ins. Co. of Am., 140 Ariz 238, 681 P.2d 390 (1983); Burns v. Ford Motor Co., 29 Ill App 3d 585, 331 NE2d 325 (1975).

Nor is it necessary to attach the incorporated documents to the agreement. See United Cal. Bank v. Prudential Ins. Co. of Am., 140 Ariz 238, 681 P.2d 390 (1983).

All referenced documents must be in existence and must be reasonably described. See Chiacchia v. National Westminster Bank USA, 124 AD2d 626, 507 NYS2d 888 (1986); Skouras v. Dmiralty Enterprises, Inc., 386 A2d 674 (Del 1978).

It is clear from the record and the great weight of authority cited above that there was a security interest granted the Bank by the Debtors and that it attached to the Debtors' collateral. The statutory formalities were followed. The Debtors executed the Security Agreements and referenced Financing Statements which included the description of the real estate. The Financing Statement is an integral part of the Security Agreement by its incorporation on the face of the Security Agreement. The Financing Statement is in existence and was executed by the Debtors. The Financing Statement serves as the legal description of the crops' property in addition to it separate function as a "Financing

Statement" under the Wyoming Statutes. Incorporation of the Financing Statements into the Security Agreements by reference is completely allowable and, in this particular case, appropriate in that the legal description of the real estate could not have been included in the Security Agreements on their face due to the physical lack of space. A separate document, whether it be the Financing Statement or exhibit, would necessarily have to have been incorporated by reference into the Security Agreement and the parties, intended the Financing Statement to serve as the legal description of the property where the crops would be grown.

"Perfection" of a security interest is directly at issue in this case. The Bankruptcy Court had relied on Landen v. PCA of Midlands, supra, in support of its decision concerning the Debtors' crops. The Landen Court addressed the issue of the over-inclusion of property in a description in a

Security Agreement and Financing Statement, and the Debtors initially argued the same point before the Bankruptcy Court in support of their position to avoid the lien.

In the Landen case, the Wyoming Supreme Court was called upon to determine whether a description of land in a Security Agreement sufficiently identified said land so as to satisfy the requirements of § 34-21-922(a)(i), § 34-21-951(a) or § 34-21-910, Wyo. Stat. 1977, so that a security interest was created in the crops. The Security Agreement in Landen described the land as follows:

> "Various [s]ections, T25N and T26N, R76W, Albany County and various sections, T23N, T24N, T25N and T26N, R68W, Platte County, Wyoming."

The Security Agreement thus stated that the creditor was secured by an unknown number of sections in two counties in Wyoming. Because there were six townships listed, the creditor's interests lie somewhere among the

216 sections or within 216 square miles in two counties.

The Wyoming Supreme Court then quoted United States v. Collingwood Grain, Inc., 792 F.2d 972, (10th Cir. 1986) as to what might be deemed a sufficient real estate description in connection with crops:

> "[A] real estate description in connection with crops is sufficient if it contains:
>
> 1. the name of the land owner
> 2. the approximate number of acres of the farm
> 3. the county of the location of the land
> 4. the approximate distance and direction of the farm from the nearest town or city." United States v. Collingwood Grain, Inc., 792 F.2d 972, 974-75 (10th Cir. 1986), quoting United States v. McMannis, 39 B.R. 98 (Bankr. D. Kan. 1983) (emphasis in original).

It has also been said that:

> "[T]he cautious creditor cannot go wrong by using a section-township legal description, so long as it is accurate." Id. at 975, quoting Kansas Comment to Kan. Stat. Ann. Section 84-9-402, which discusses Chanute Production Credit Association v. Weir Grain & Supply, Inc., 210 Kan. 181, 499 P.2d 517 (1972).

The court then held: "...that the description of property in the Landen case fell short of both of these tests. A vague reference to various sections within certain townships and ranges does not reasonably identify the land so as to satisfy the requirements of § 34-21-922(a)(i), § 34-21-951(a), or § 34-21-910." Landen v. Production Credit Association of the Midlands, supra at 1329.

The Landen decision is distinguishable from the case at hand. First, in Landen the Security Agreement in question was not specific as to what property the creditor had an interest in. The Security Agreement in Landen only indicated that the creditor had an interest somewhere within a 216 square mile area within two counties. In this case, Stockmens Bank and Trust Company has perfected a security interest which specifically describes the properties by which it is secured. The six contiguous sections were all

located in a single township and county, and all were specified by legal description. In this case, Stockmens Bank and Trust Company had filed Financing Statements, executed by the Debtors, incorporated by reference into the Security Agreements, which specifically described the section, township, range and county in which the Bank is secured.

The fact that the description of the property on which the crops were growing or to be grown is overly broad should not, in itself, defeat the security interest of FDIC. The basic test of whether a real estate description is sufficient is stated in Wyo. Statutes 34-21-910 and Section 34-21-951.

The official UCC comment to 9-110 from which 34-21-910 is adopted states as follows:

> "The requirement of description of collateral (see § 9-203 and Comment thereto) is evidentiary. The test of sufficiency of a description laid down by this section is that the description do the job assigned to it -- that it make possible the identification of the thing described. Under this rule courts should refuse to follow the holdings, often

found in the older chattel mortgage cases, that descriptions are insufficient unless they are of the most exact and detailed nature, the so-called "serial number" test. The same test of reasonable identification applies where a description of real estate is required in a Financing Statement. See Section 9-402."

The official UCC comment to 9-402, Comment 5, from which 34-21-951 is derived states as follows:

"A description of real estate must be sufficient to identify it. See Section 9-110. This formulation rejects the view that the real estate description must be by metes and bounds, or otherwise conforming to traditional real estate practice in conveyancing, but of course the incorporation of such a description by reference to the recording data of a deed, mortgage or other instrument containing the description should suffice under the most stringent standards. The proper test is that a description of real estate must be sufficient so that the fixture Financing Statement will fit into the real estate search system and the Financing Statement by found by a real estate searcher." (emphasis added)

In accord with the official UCC comments in the case United States v. Collingwood Grain, Inc., 792 F.2d 972 (10th Cir. 1986)

which the Wyoming Supreme Court relied upon in Landen, supra.

In that 10th Circuit Court decision, the court was called upon to rule on whether a Financing Statement covering crops grown on 160 acres of leased land within a single 640 acre section was sufficient under the Kansas law, even though it did not specify which 160 tract within the 640 acre section was subject to the Security Agreement. The District Court found that the description of the land on which the secured creditor claimed a security interest in growing crops was insufficient to perfect a security interest. The secured creditor appealed.

Like Wyoming, in Kansas when growing crops are to be covered by a Security Agreement, the agreement must include a "description of the real estate concerned." See Kan. Stat. Ann. Section 84-9-402(1), Section 84-9-203(1)(a)(1983), and Wyo. Stat. Section 34-21-951.

The Court of Appeals then noted that the District court in Kansas relied on In re McMannis, 39 B.R. 98 (Bankr. D.Kan. 1983). In McMannis, the Court stated as follows:

> "Most Courts have held that a Financing Statement real estate description in connection with crops is sufficient if it contains:
>
> 1. the name of the land owner
> 2. the approximate number of acres of the farm
> 3. the county of the location of the land
> 4. the approximate distance and direction of the farm from the nearest town or city." Id at 100.

The Court of Appeals, after reflecting on the list above, stated that the "list shows only the items that will guarantee sufficient description. It does not present items that are always required. To hold that it does would ignore Kansas statute and commentary." United States v. Collingwood, supra at 975 (emphasis added). The Court of Appeals then went on to hold that:

> "The 160 acres are described as within a 640 acre section. It would not take an elaborate investigation to discover which

> land was covered. The Collingwood filing surely "provided clues sufficient that third parties by reasonable care and diligence [might] ascertain the property covered..." See Kan. Stat. Ann. Section 84-9-110 Kansas Comment at 409 (1983). United States v. Collingwood Grain, Inc., supra at 975.

The Court of Appeals decision would be consistent with the trend of the courts to construe the Uniform Commercial Code to be lenient in judging the sufficiency of descriptions in Financing Statements. See Tri State Equipment Co., Inc. v. Allis-Chalmers Credit Corp., 792 F.2d 967, 971, 972 (10th Cir. 1986); John Deere Co. v. Butler County Implement, Inc., 232 Kan. 273, 655 P.2d 124, 30 (1982).

Thus in Collingwood, which the Wyoming Supreme Court relied upon in Landen, the Court of Appeals reversed the District Court of Kansas and held that the over-inclusion of property in a Financing Statement does not vitiate the perfection of a security interest.

As a general proposition, the issue decided by the Bankruptcy Court was not even presented to the Bankruptcy Court by either the Debtors or the FDIC. The Bankruptcy Court, on its own initiative, chose to decide the issue concerning the FDIC's lien by looking at the Security Agreement between the Debtors and the Bank. The parties were arguing before the Bankruptcy Court about the legal description contained in the Financing Statements. It is therefore quite understandable why the Bankruptcy Court arrived at the decision it did, when it was not fully briefed or advised of the evidence to consider when looking at the Security Agreement. The legal conclusions drawn by the Bankruptcy Court are clearly based upon a misunderstanding of the record presented at the April 12, 1989, hearing, in that the record presented the Court was only aimed at the issue of legal description contained in the Financing Statements, not the validity or

the existence of Security Agreement. The validity and existence of the Security Agreements between the Debtors and the Bank has never been disputed by the Debtors; only their perfection. The Bankruptcy Court does state the basic problem with its decision on Page 4 wherein the Court states that "both parties have submitted the Motion on the issue of whether the real estate description in connection with crops contained in the Financing Statements is sufficient to perfect the security interest under the Wyoming Uniform Commercial Code." (emphasis in original). It is clear that the Bankruptcy Court was not fully advised as to the position of the parties concerning the Security Agreements nor was it looking correctly at the documents necessary to arrive at its decision. The Court did address the adequacy of the legal description in the Security Agreement by reference to the Landen case, supra. However, the Court failed to take into account the

incorporation by reference of the legal description in the Financing Statements discussed above.

The Appellees, in their brief, state that the "issue raised by this appeal is whether the FDIC had a valid security interest on the Appellees' crops after 1986" (emphasis added). This would imply that there was a valid perfected security interest on the crops in 1986 which became invalid after 1986. The actual issue on Appeal is whether or not there was a valid perfected security interest in any year, 1986 or otherwise.

The Appellees attached an Exhibit B to their Brief which they say shows the legal description of the property upon which the debtors' grow crops. Their argument is that the Exhibit B description is different from that of the FDIC's. However, a careful examination of the documents shows that all of the sections of property referenced in the FDIC's Security Agreements are, in fact,

included in the legal description in Appellee's Exhibit B.

The Appellees' argument that 11 U.S.C. Section 552 eliminates the lien on the post-petition crops does not take into account the fact that the Debtor used the proceeds from the FDIC's pre-petition crops to create the post-petition property. Consequently, under 11 U.S.C. Section 552(b), the post petition crops are, for all intents and purposes, proceeds to which the FDIC security interest attaches.

The Appellees further state the "those crops or products thereof have been disposed of long ago by the bankruptcy estate" and argue that this allegation somehow makes this appeal a moot issue. While the Debtors' statement of proceeds' disposition is probably true, it does not negate the fact that the FDIC's security interest attaches to the crops and their sale proceeds and the FDIC, under

the U.C.C., still has a cause of action to recover the proceeds.

The Debtors argue to this Court that since they have sold all their crops and spent the money, there is no longer an issue to be determined. This is not the case. The issue (the existence of the security interest) is still a matter in controversy not only in this Appeal but also in a replevin action in the Wyoming State District Court in and for the County of Campbell, Sixth Judicial District, in a civil action entitled FDIC v. Coones et al. As was explained above, the crops and proceeds which the Debtors have disposed of are all subject to the security interest of the FDIC and can be recovered by the secured party.

As a matter of federal law, the order relied upon by the Debtors from the Bankruptcy Court below is not final for all purposes. Section 1730(a)(1) of Title 12 of the United States Code provides in pertinent part that;

> "No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit, or proceeding in any court of any state or of the United States or any territory, or any other court."

Similarly, 12 U.S.C. Section 91 states that "No attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action or proceeding in any state, county, or municipal court," in United States v. LeMaire, 826 F.2d 387 (5th Circ. 1987), cert. denied, 485 U.S. 960 (1988), the Court reviewed 12 U.S.C. Section 91 and determined that "final judgment" as used in Section 91 "means a judgment on the merits which is no longer subject to examination on appeal, either because of disposition on appeal and conclusion of the appellate process, or because of the passage, without action, of the time preceding appellate review." LeMaire, 826 F.2d 390. Therefore, it follows that as a matter of federal law, the bankruptcy court's

Order was not final as to the FDIC and, since the bankruptcy court's Order was not final, the security interest of the FDIC was not voided.

Appellees further argue that general contract principles are not applicable in this appeal. General contract principles are applicable to the Uniform Commercial Code. The fact of the matter is that the Uniform Commercial Code is an offspring of Contract Law; a codification of all commercial transactions up to and including the creation of the Uniform Commercial Code.

W.S.A. Section 34.1-1-1-102 states explicitly the purposes and policies behind the Uniform Commercial Code. Not only is the Wyoming version of the Uniform Commercial Code to be "liberally construed and applied to promote its underlying purposes and policies", but the very purposes and policies of the Wyoming Code include the "expansion of

commercial practices through custom usage and agreement of parties" (emphasis added) Id.

The Debtors rely on In re Mack, 93 B.R. 695 (Bankr.D.N.D. 1988) as a case "strikingly similar to the instant one". However, the Appellees fail to point out to this Court that the Mack case has a factual setting that is completely different than the one in this case. In the Mack case, there was an attempt by a secured creditor, who failed to include any property description or reference to the property in the security agreement, to claim a perfected security interest. The creditor in Mack did describe the property in the Financing Statement and the court correctly found that this was insufficient to create a security interest. The facts in this case show that the description of the property upon which the crops were growing and were to be grown was included on the face of the Security Agreement by reference to a separate document: a practice that is standard in the

agricultural industry when it concerns legal descriptions too large to fit on the face of the Security Agreement form. The Appellees state that the "reference to the county is necessary for a sufficient real estate description" citing United States v. Collingwood Grain Inc., 792 F.2d 972 (10th Circ. 1986). The Collingwood case does not require reference to the county. The Collingwood case stands for the proposition that reference to a county may be one of the factors considered by the court in deciding insufficiency of the property description. The case does not demand that secured creditors accurately describe the property as would be argued by the Debtors.

THEREFORE, IT IS ORDERED that the ruling of the Bankruptcy Court below that the FDIC does not have a perfected security interest in the Debtors' crops be, and it hereby is, reversed.

DATED this 5th day of December, 1990.

s\Ewing T. Kerr
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

| | | |
|---|---|---|
| JAMES ALBERT COONES and CINDY LEE COONES, f/k/a Cindy Lee Jones, | ) | |
| Debtors/Appellants, | ) | |
| v. | ) | No. C89-243-K |
| FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of the Stockmen's Bank and Trust Company and as Liquidator for the First National Bank of Sheridan, Wyoming, | ) | |
| Appellee. | ) | |

ORDER ON APPELLANTS' EXEMPTION APPEAL

This matter came before the Court on Debtors/Appellants' appeal from orders entered by the United States Bankruptcy Court for the District of Wyoming in a case entitled In re: James Albert Coones and Cindy Lee Coones, Case No. 88-05343-B. The Appellants sought Chapter 11 relief under Title 11 of the United States Code. The first order denied the Appellants more than one exemption as to their tools of trade under WYO. STAT. Section 1-20-

106(b)(1983) when they are engaged in the same business. In the second order, the Court denied the Appellants an exemption pursuant to WYO. STAT. Section 1-15-101 et. seq. Laws, 1987, as to 75% of the proceeds derived from the sale of livestock. The lower court also denied an exemption as to unsevered crops, livestock and offspring of livestock, notwithstanding the security interests of the Appellee. Having considered the materials on file both in support of and in opposition to the appeal, having considered the arguments of the parties, and being fully advised in the premises, the Court FINDS and ORDERS as follows:

DISCUSSION

In reviewing the decision of the bankruptcy court, the district court as well as the court of appeals must accept the factual findings of the bankruptcy court unless they are clearly erroneous. In re Branding Iron Motel, Inc., 798 F.2d 396, 399

(10th Cir. 1986). While the meaning of the phrase "clearly erroneous" is not immediately apparent, the Supreme Court recognized that a finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The application of the clearly erroneous standard to the bankruptcy court's factual findings does not permit the district court to conduct a de novo review and duplicate the role of the lower court. In re Yeates, 807 F.2d 874, 877, n.2 (10th Cir. 1986); Branding Iron, 798 F.2d at 399, n. 3; In re Reid, 757 F.2d 230, 233-34 n.5 (10th Cir. 1985). The issues on appeal here concern matters of law and, in accordance with the foregoing and Rule 8013 of the Bankruptcy Rules of Procedure, findings of

fact by the Bankruptcy Court will not be set aside.

The Appellants/Debtors, James A. and Cindy L. Coones, filed their petition for relief under Chapter 11 of the Bankruptcy Code on October 20, 1988. The Appellants are engaged in a farming and ranching operation. At the time of the filing of the petition, the Appellants did not submit all schedules and statements as required under Bankruptcy Rule 1007. However, Bankruptcy Rule 1007(c) allows an additional fifteen (15) days to file the schedules and statements if the petition is accompanied by a list of all the debtor's creditors and their addresses. Bankruptcy Rule 1007(c) states that an extension of time for the filing of the schedules and statements may be granted "only on motion for cause shown and on notice to any committee, trustee, examiner, or other party as the Court may direct. Notice of an extension shall be given to any committee, trustee, or other party as

the Court may direct." The Appellants did not file their exemption schedule until November 16, 1988, 27 days after the petition date and did not file a motion requesting additional time. The Appellants claimed exemptions based on Lingle State Bank v. Podolak, 740 P.2d 392 (Wyo. 1987).

The meeting of creditors was held on December 8, 1988. The Appellants filed an Application to Avoid Lien Impairing Debtors' Exemptions on February 23, 1989. The FDIC filed a Motion to Prohibit Use of Cash Collateral on March 9, 1989. The FDIC then filed a request to be allowed to object to Debtors' Motion to Avoid Lien on April 10, 1989. The Debtors' Motion to Avoid Lien, FDIC's request to be allowed to object to Debtors' Motion to Avoid Lien, and FDIC's Motion to Prohibit Use of Cash Collateral were heard by the Bankruptcy Court on April 12, 1989. The bankruptcy court entered three (3) Orders on May 16, 1989 on (1) the Debtors'

Motion to Avoid FDIC's Lien pursuant to 11 U.S.C. Section 522(f), (2) Debtors' Application to Avoid Lien pursuant to WYO. STAT. Section 1-15-408 and Section 1-15-101, et. seq., Laws, 1987, and (3) FDIC's Motion to Prohibit Use of Cash Collateral. In addition, on June 26, 1989, the Court entered an Order Denying In Part And Granting In Part the FDIC's Motion to Prohibit Use of Cash Collateral.

The Debtors' filed a Motion for Reconsideration on May 26, 1989 to reconsider the May 16, 1989 Orders entered by the Bankruptcy Court. Judge Mai entered his Order Denying Motion for Reconsideration on June 20, 1989 and the Appellants' filed their Notice of Appeal on June 29, 1989. At the same time the Appellants' moved for Certification of Issues on Appeal to the Wyoming Supreme Court.

The underlying Chapter 11 Bankruptcy case concerning the Appellant, James Albert Coones, was dismissed by Order of the Bankruptcy Court

entered on March 29, 1990. On April 13, 1990 an Order was entered by the Bankruptcy Court below converting the Chapter 11 case of the Appellant, Cindy Lee Coones, to a Chapter 7 proceeding.

The Bankruptcy Court found that when both husband and wife are engaged in the same farming operation, WYO. STAT. Section 1-20-106(b) 1977, 1986 Cum. Supp. allows only one exemption as to the farm equipment and vehicle. The Court further found that the 75% exemptions claimed on the bankruptcy schedules were unreasonable and that the reasoning under Lingle State Bank v. Podolak, 740 P. 2d 392 (Wyo. 1987) was no longer applicable since Section 1-17-411 WYO. STAT. 1977, 1986 Cum. Supp. had been completely rewritten since that decision. The Statutes which apply to this case are WYO. STAT. Section 1-15-408 and Section 1-15-101 et. seq. 1987. The Bankruptcy Court found, as a matter of law, that WYO. STAT. Section 1-20-106(b)(1983)

permits only one exemption per business. The bankruptcy court further found that as a result of the enactment of WYO. STAT. Section 1-15-408 (1987) and Section 1-15-102 (a)(vi) et. seq. (1987), the Debtors could not claim 75% exemptions for livestock offspring, livestock, or harvested crops. The Bankruptcy Court denied the Debtors' Motion to Avoid FDIC's Lien except to the extent of $2,000.00 in tools of trade and ordered the Debtors to amend their petition to specify what items they desired to exempt. The court further ordered that the Debtors should segregate and account for the livestock proceeds and were prohibited from using those proceeds. Finally, the lower court denied FDIC's Motion to Prohibit Use or Cash Collateral only insofar as the motion pertained to proceeds of the Debtors crops.

The Appellants' Motion for Certification of Issues on Appeal was granted by this Court and the Wyoming Supreme Court, in Case No. 89-

209, issued its opinion in essence stating that the Appellants could not claim a 75% exemption in their livestock or crops. The Wyoming Supreme Court did allow each Appellants a two thousand dollar ($2,000.00) tool of trade exemption and these rulings by the Wyoming Supreme Court were adopted by this Court in its "Order Affirming In Part and Reversing In Part Decision of the Bankruptcy Court as Pertains to Issues Certified and Reserving Ruling as to Remaining Issues" entered in Case No. C89-243-K on August 31, 1990.

The Wyoming Supreme Court thought that the Appellants attempt to claim 75% exemption in their livestock and crops was thoughtful and ingenious. The Wyoming Supreme Court further went on to find that the Claim of Exemption had no legal basis.

When there is no legal basis for the exemption claimed, failure of the creditors or the trustee to object to the Debtors' claimed

exemption within thirty (30) days after conclusion of the meeting of creditors as required by the Bankruptcy Code does not mean that the Debtor is entitled to the exemption. In re: Rollins, 63 B.R. 780 (Bkrtcy. E.D. Tenn. 1986). Property claimed as exempt does not automatically become exempt; there must be a statutory basis of exemptions. In re: Bennett, 36 B.R. 893 (Bkrtcy. W.D.K.y. 1984).

> "Read quite literally, the statute (Section 522(1) of the Bankruptcy Code) seems to say that unless a party raises an objection, a debtor may claim an exemption in any property that he himself characterizes as exempt - an exemption, as it were, by declaration." In re: Bennett, supra, at 894.
>
> "What we have chosen to call "exemption by declaration" is unacceptable for broader policy reason. The obvious result of such a rule would be to encourage a debtor's claim that all of his property is exempt, leaving it to the bankruptcy trustee and creditors to successfully challenge that claim. We would revert to the law of the streets, with bare possession constituting not nine, but ten, parts of the law; orderly administration of estates would be replaced by uncertainty and constant litigation if not outright anarchy." In re: Bennett, supra, at 895. (Emphasis in original).

The Appellants' claim of exemption of 75% of their crops and livestock, having been declared invalid by the Wyoming Supreme Court, should therefore not be allowed by this Court due to a technical problem in the timing of the objection to the claim of exemption. There is no statuary or other legal basis for the claim of exemptions. See also In Re Roehrig, 36 B.R. 505 (Bkrptcy. W.D. Ky. 1983).

The Appellant cites In re: Anselmi, 52 B.R. 479 (Bankr. Wyo. 1985) in support of his argument that, since neither the Trustee nor any other creditor objected to the Appellants' claim of exemptions, it should be allowed. However, the Appellant overlooks one important word in the Anselmi holding;

> "A Debtor's proper claim of exemptions becomes final and should not be deemed allowed unless a creditor files an objection to the schedule of property claimed as exempt within thirty days after the meeting of creditors pursuant to Section 341 of the Code. Bankruptcy Rule 4003(b)." In re: Anselmi, supra at 485. (Emphasis added).

The operative word is "proper". As was pointed out above, the Wyoming Supreme Court has already decided that the claim of exemptions was not proper and therefore the Anselmi ruling is inapplicable to this case.

> "Sound policy dictates that the debtor not be permitted to interpose Section 522(1) to prevent a creditor's raising invalidity of claimed exemptions as a defense to a lien avoidance action". In re Montgomery, 80 B.R.385,390 (Bkrtcy.W.D. Tex. 1987)

The Montgomery case, above, is relied upon by the Appellant in his brief. The Montgomery court looked past the superfluous "entitlement to the exemption" and actually looked at the Debtor's attempt to avoid the creditor's lien.

> "It is also entirely appropriate that a debtor about to eliminate another's property rights be put to his or her proof, and not be permitted to rely on a technical estoppel which is at best only tangentially related to the lien avoidance issue in any event. This is so for two reasons. First, the express language of Section 522(f) directs the court not to what has been deemed exempt but rather to what would be exempt under Section 522(b). The wording of the statute simply reflects that, while

> Congress was generally solicitous of the debtor's fresh start, that solicitude was not without boundaries, especially when it came to balancing that fresh start against pre-existing property rights. It is to Section 522(b), not to Section 522(l), that the court's attention must be directed in Section 522(f) actions. Matter of Allen, 725 F.2d 290, 292-93 (5th Cir. 1984).
>
> Second, requiring secured creditors to object to exemptions in order to preserve defenses to potential lien avoidance action that may never be brought tends to multiply litigation. In fact, such a rule actually frustrates the prompt determination policy which underlies Section 522(l)". In re Montgomery, supra, at 389. (Emphasis in original)

The Montgomery case points out that the FDIC's failure to timely object to the Debtors' claim of exemptions did not estop the FDIC, as a lien holder, from raising the issue of entitlement to exemptions in a subsequent lien avoidance action.

The Appellants further rely on the case of In re Hahn, 60 B.R. 69 (Bkrtcy D. Minn. 1985). Although the Hahn court took a strict interpretation of the Bankruptcy Code and Rules, the holding does recognize a

distinction between the Hahn case and the case at hand here; that distinction being that the Hahn creditor had no evidence available to prove the impropriety of the debtor's claim of exemptions. Had the creditor been able to show (as is the case here) that the debtor's claim of exemptions had absolutely no basis, the Hahn court quite arguably might have ruled the other way. Hahn, 60 B.R. 69, 76, n.3. The rationale in the Hahn case was also discounted by the Montgomery court. See Montgomery, supra, at Page 388.

The Montgomery court stated that one of the reasons for allowing a creditor to bring into issue the exemption claim was that, in the alternative, creditors would have to "multiply litigation" to protect their secured interests. See Montgomery, supra, at Page 389. This very real concern by the Montgomery court is the only outcome which can be forecast from the Lassiter decision relied upon by the Appellants. Matter of Lassiter,

104 B.R.119 (Bkrtcy. S.D. Iowa 1989). The only procedure left for any secured creditors in the District following the Lassiter ruling is that not only must a creditor anticipate a lien avoidance action by the debtor but must also object to any potential claim of exemptions at the outset that may affect any property in which the creditor has a security interest. This clearly is not the intent of the Bankruptcy Code or the Rules and will not be followed by this Court.

The Appellants also relied on In re Grossman, 80 B.R. 311 (Bkrtcy. E. D. Pa. 1987). This case is clearly distinguishable from the case at bar in that the Trustee in the Grossman case, seeking a turnover of property, failed to file any action until one (1) year after the Creditors' Meeting and apparently failed to file any objection to the debtor's claim of exemptions. The Grossman court took a strict interpretation of the Bankruptcy Code and the Rules and,in light of

the one (1) year delay by the Trustee, denied the Motion for Turnover. That is not the case here as the litigation involving the lien was commenced within three (3) months of the Creditors' Meeting, which litigation was initiated not only by the FDIC but also by the Appellants.

The Bankruptcy Court is a "court of equity". It is axiomatic in equity that he who seeks equity must do equity (the "Clean Hands" Doctrine). As the record reflects, the Appellants filed their Chapter 11 petition on October 20, 1988 but did not file their schedules or statements until November 16, 1988, twenty-seven (27) days after the filing of the petition. Further, the creditors' meeting was held on December 8, 1988, twenty-two (22) days after the filing of the schedules and statements.

Bankruptcy Rule 1007(c) allows the Debtor only fifteen (15) days to file the schedules and statements after the filing of the

petition. Extensions of time beyond that deadline may be granted only on motion for cause shown and upon notice to any committee, trustee, examiner or other party as the Court may direct, and the United States Trustee. This fifteen (15) day period allowed by the Code ran on November 4, 1988. There was no Motion for Extension filed nor was an order entered allowing such an extension.

The public policy behind the rule requiring the debtor to file his statements and schedules is clear; it allows all creditors and other parties in interest a sufficient time period prior to the creditors' meeting to make informed decisions concerning, among other things, the debtor's claims of exemptions.

As the record shows, there has been substantial litigation in the Bankruptcy Court concerning the exemptions and the FDIC's lien allegedly impairing the exemptions. The Debtors filed a Motion To Avoid the FDIC's

Lien together with an Application To Avoid the Lien. The FDIC filed a Motion To Prohibit Use Of Cash Collateral on March 9, 1989. It is clear that the Appellants' rights to a claim of exemption were not impaired by any late filing of pleadings to put the exemption claim into issue as their original Application and Motion were filed in February of 1989 approximately three (3) months after the creditors' meeting.

Although the FDIC did not comply with the procedure for filing an objection to the Appellants' claim of exemption, litigation involving the claim of exemption amounted to the creditor's objection to Appellants' claim of exemption and was not untimely. Matter of Grosslight, 757 F.2d 773 (6th Cir. 1985).

Finally, the case of In re Robertson, 105 B.R. 440 (Bkrtcy. N.D. Ill. 1989) is a case which, within its own four corners, mirrors the facts in the case at hand and the ruling is well reasoned and will be followed by this

Court. In Robertson, the debtor did not timely file their Schedules and Statements and the Robertson court found that the debtor was not entitled to the automatic exemptions.

> "In this case, the exemption claim late-filed without notice, motion, or leave of Court, is not entitled to the automatic allowance that Bankr.R. 4003(a) gives to a timely filed exemption claim it if is not timely objected to. He who seeks to benefit by the Bankruptcy Rules must abide by them". In re Robertson, supra, at 450 (emphasis added)"

It is clear that what is happening in this case is that the Appellants are trying to establish an "exemption by declaration" as there is absolutely no legal basis whatsoever for the claim of exemptions.

The original failure to follow the requirements of the Bankruptcy Code rests with the Appellants. Their untimely filing of the statements and schedules prejudiced all of the creditors including the FDIC. The resulting litigation before the Bankruptcy Court concerning the claim of exemptions amounted to a timely objection to the Debtors' claim of

exemptions and the objection should be allowed.

The Appellants, in their "Statement of Issues" originally filed in this matter after their Notice Of Appeal, set forth the issues as follows:

> 1. Whether the Bankruptcy Court's decision in regard to Debtors' claim of exemption as to personal service earnings is in conflict with the Wyoming Supreme Court's decision in Lingle State Bank v. Podolak, 740 P.2d 392 (1987).
>
> 2. Whether W.S. Section 1-15-408 (1987) allows Debtors involved in the occupation of ranching and farming to claim as exempt 75% of the proceeds resulting from the sale of livestock produced and raised through said Debtors' animal husbandry practices.
>
> 3. Whether W.S. Section 1-15-408 (1987) allows Debtors involved in the occupation of ranching and farming to claim as exempt crops and offspring of livestock raised and produced by Debtors even though not reduced to cash proceeds.
>
> 4. Whether W.S. Section 1-20-106(b) (1983) allows husband and wife Debtors to each claim an exemption of $2,000.00 as to their tools of trade when both husband and wife Debtors are engaged in the occupation of farming and ranching.
>
> 5. Whether the Bankruptcy Court erred in denying Debtors' Motion to Avoid

F.D.I.C.'s liens against their tools of trade.

6. Whether Debtor's exemptions should have been allowed since no timely objection was filed by F.D.I.C." (Appendix Exhibit "L")

Issues number 1 through 5 above were certified to the Wyoming Supreme Court from this Court, ruled upon, and adopted by this Court in its earlier Order. Therefore, the only remaining issue on appeal in this matter (as styled by the Appellants) is Issue No. 6 set forth above.

The Appellant states an additional issue in his brief: "Whether the livestock and proceeds therefrom were collateral of the Appellee". The argument presented by the Appellant goes to the existence of a security interest in the Appellants' collateral. However, this was not an issue raised by the Appellants in their "Statement of Issues" originally filed in this matter. This is, in fact, an issue which is currently under cross-appeal in this Court (Case No. 89-242-K,

F.D.I.C. v. Coones, regarding the security interest in the crops) and in another appeal entitled James A. Coones v. Mutual Life Insurance Company of New York and Federal Deposit Insurance Corporation, Case No. C90-0204-J in the United States District Court for the District of Wyoming, involving the issue of whether or not relief from the automatic stay should have been granted by the Bankruptcy Court.

It is clear from the Statement of the Issues of the Appellants' in this case that the additional collateral attack on the security interest is not a part of this appeal and will not be considered by this Court in this case (Case No. C89-243-K) as it is being fully explored in the other two appeals as mentioned above.

THEREFORE, IT IS ORDERED that the ruling of the Bankruptcy Court below disallowing the Debtors' claim of exemptions be, and it hereby is, affirmed.

DATED this 5th day of December, 1990.

s\Ewing T. Kerr
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF WYOMING

| | | |
|---|---|---|
| In re | ) | |
| | ) | |
| JAMES ALBERT COONES and CINDY LEE COONES, f/k/a Cindy Lee Jones, | ) | Case No. 88-05343-B |
| | ) | Chapter 11 |
| | ) | |
| | ) | |
| Debtors. | ) | |
| | ) | |

D E C I S I O N

THIS MATTER comes before the court on the FDIC's Motion to Prohibit Use of Cash Collateral: Stephen R. Winship, Casper, Wyoming, appearing for the debtors; Jeanne R. Lee, Denver, Colorado, appearing for the FDIC as receiver for Stockmens Bank and Trust Company.

Now, the court having considered the Motion, the memoranda, having heard argument of counsel, and being fully advised, does hereby render its Decision.

The facts are not in dispute. On May 16, 1986, the debtors executed two notes, in the principal amounts of $400,000 and $70,000, to

the Stockmens Bank. The notes were a combination promissory note and security agreement with the security agreement covering the bottom half of the document. The combined notes/security agreements contain the following description of collateral:

> All inventory of cattle, horses, and all other livestock, all farm products of cattle, horses, and all farm equipment and machinery, other equipment and machinery, inventory, farm products, hay, grain, crops, crop inventory and crop farm products, vehicles, accounts, contact rights or general intangibles arising from the sale or disposition of products thereof, now owned or hereafter acquired and wherever located.

At the bottom right hand side of the combination Promissory Note/Security Agreement is a space labeled, "Description of Real Estate if above Collateral is crops, growing or to be grown, timber, minerals (including oil or gas) or fixtures." This is followed by the typed description "RECORDED ON FINANCING STATEMENT DATED MAY 16, 1986."

In addition to the combination note/ security agreement, on May 16, 1986 the

debtors also executed separate security agreements to secure the $70,000 and $400,000 debts. The two (2) security agreements are basically identical. Both refer to Exhibits A and B which are attached to the security agreements. Exhibit B contains the identical description of collateral set forth above in the indented quote, together with the addition of certain specified livestock and the statement "all located 38 miles N.W. of Gillette on Spotted Horse Creek."

The Bank filed financing statements with the County Clerk, Campbell County, Wyoming, and the Wyoming Secretary of State.

The financing statements filed on May 19, 1986 with the Campbell County Clerk, and May 29, 1986 with the Secretary of State, State of Wyoming, all contained the following language:

> All farm products of cattle, horses, farm products, hay, grain, crops, crop inventory and crop farm products, contract rights, assignment of federal crop insurance, & assignment of Commodity Credit Corporation proceeds, arising from the sale or disposition of products

thereof, now owned or hereafter acquired and wherever located.

Legal Description

Section 28, Township 56, Range 75
Section 27, Township 56, Range 75
Section 33, Township 56, Range 75
Section 34, Township 56, Range 75
Section 35, Township 56, Range 75
Section 26, Township 56, Range 75

The FDIC asserts that the debtors' crops are covered by its properly perfected security interest and, therefore, the proceeds are "cash collateral" that cannot be used without either its permission or an order of this court.

The debtors, on the other hand, argue that the FDIC's interest is not properly perfected and, therefore, the proceeds of their crops are not cash collateral within the meaning of 11 U.S.C. § 363.

Both parties have submitted the Motion on the issue of whether the real estate description in connection with crops contained in the financing statements is sufficient to perfect the security interest under the Wyoming Uniform Commercial Code.

However, there is a more basic problem with the FDIC's claim of a perfected security interest in the crops and proceeds thereof. There is no adequate real estate description in connection with crops contained in the security agreements.

The Wyoming Uniform Commercial Code provides:

> [A] security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:
>
> (i) The collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned; . . .

§ 34-21-922(a)(i), W.S. 1977 (1988 Cumm. Supp.) (emphasis added).

> For the purposes of this article, any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described.

§ 34-21-910, W.S. 1977.

To meet the requirements of sections 34-21-910 and 34-21-922(a)(i), a "real estate description in connection with crops is sufficient if it contains:

1. the name of the land owner
2. the approximate number of acres of the farm
3. the county of the location of the land
4. the approximate distance and direction of the farm from the nearest town or city."

Landen v. Production Credit Association, 737 P.2d 1325, 1329 (Wyo. 1987), quoting United States v. Collingwood Grain, Inc., 792 F.2d 972, 974-75 10th Cir. 1986).

A creditor may also use a section-township legal description, "so long as it is accurate." Id.

In this case, the security agreements, which are the documents which create the security interests, do not contain an adequate

description of the land covered in connection with crops as required by § 34-21-922.

There is no township-range description in the security agreements. The descriptions of the real estate that are contained do not identify the owner of the land, do not specify the number of acres, or the county of location.

The descriptions in Exhibit B to the combined note/security agreement do specify the approximate distance and direction from a nearby town. However, by itself, that is not sufficient to identify the real estate.

It simply is not possible to identify the subject real estate upon which the crops will be grown by reference to the security agreements. Therefore, they fail to meet the requirements of § 34-21-922.

The fact that the real estate is more specifically described in the financing statements does not alter this result. It is the security agreement that creates the

security interest. A properly filed financing statement can only perfect, not create, a valid security interest.

> Although [UCC § 9-110 (§ 34-21-910, W.S. 1979)] sets forth the test for sufficiency of the description of collateral in both the security agreement and the financing statement, a description of collateral sufficient for a financing statement might not be sufficient in a security agreement. This is because the financing statement and the security agreement serve different purposes.
>
> The purpose of the financing statement is merely to provide notice of a possible security interest in the collateral in question. The description of collateral in a financing statement is sufficient if it reasonably informs third parties that an item in the possession of the debtor may be subject to a prior security interest, thus putting the parties on notice that further inquiry may be necessary.
>
> The security agreement is the contract between the parties; it specifies what the security interest is. Because of its different function, greater particularity in the description of collateral is required in the security agreement than in the financing statement. . . . [t]he description of collateral contained in the security agreement controls over that contained in the financing statements.

Landen v. Production Credit Association, supra, at 1325, quoting American Restaurant Supply Company v. Wilson, Fla. App., 371 So.2d 489, 490 (1979) (emphasis in original).

In motions regarding the use of cash collateral, a creditor must show that the cash involved is cash collateral within the meaning of § 363(a). This burden can be met by presenting documentation establishing a prima facie valid and perfected security interest in the collateral and its proceeds.

In this case, the movant has failed to establish that the proceeds of the crops are proceeds "of property subject to a security interest" within the meaning of § 363(a). Accordingly, its Motion to Prohibit Use of Cash Collateral will be denied insofar as it referred to proceeds of the debtors' crops.

DATED this 23 day of June, 1989.

BY THE COURT

s\Harold L. Mai
United States Bankruptcy Judge



BEST AVAILABLE COPY

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF WYOMING

| | | |
|---|---|---|
| In re: | ) | Chapter 11 |
| | ) | |
| JAMES ALBERT COONES and CINDY LEE COONES, | ) | Case No. 88-05343-B |
| | ) | |
| Debtors. | ) | |

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ORDER ON FDIC'S MOTION TO PROHIBIT USE OF CASH COLLATERAL

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THIS MATTER comes before the Court upon the Motion of the Federal Deposit Insurance Corporation as Receiver of Stockmens Bank and Trust Company and First National Bank of Sheridan ("FDIC") to prohibit the use of cash collateral. After hearing the statements by counsel for the FDIC and Debtors, the Court makes the following findings:

1. Pursuant to 11 U.S.C. Section 363, the Debtors should have segregated any and all cash collateral in his possession, custody, and control on petition date.

2. Pursuant to 11 U.S.C. Section 363, the Debtors should not have used any cash collateral without the consent of the FDIC or pursuant to an order of the Court.

In light of the above, the Court HEREBY ORDERS THE FOLLOWING:

1. The Debtors shall forthwith segregate the cash collateral of the FDIC if they have not already done so.

2. The Debtors shall forthwith prepare an accounting of the use of cash collateral since the petition date for review by the FDIC.

3. The FDIC shall have the right to inspect the Debtors' records to insure compliance with 11 U.S.C. Section 363.

4. Pursuant to 11 U.S.C. Section 363, the Debtors shall not use said cash collateral without a court order allowing them to do so or unless the FDIC has expressly consented.

DATED this 16th day of May, 1989.

BY THE COURT:

s\Harold L. Mai
United States Bankruptcy Judge

APPROVED AS TO FORM:

By: _____
Stephen R. Winship, Esq.
Attorney for the Debtors

By: s\Jeanne R. Lee
Jeanne R. Lee, Esq.
Attorney for the FDIC

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF WYOMING

| | | |
|---|---|---|
| In re: | ) | Chapter 11 |
| | ) | |
| JAMES ALBERT COONES and CINDY LEE COONES, | ) | Case No. 88-05343-B |
| | ) | |
| Debtors. | ) | |

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ORDER ON DEBTORS' APPLICATION TO AVOID LIEN PURSUANT TO WYO. STAT. SECTIONS 1-15-408 AND 1-15-101, et. seq., LAWS, 1987

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THIS MATTER comes before the Court upon the Debtors' Application to Avoid Lien Pursuant to Wyo. Stat. Sections 1-15-408 and 1-15-101 et seq., Laws, 1987. After hearing the statements by counsel for the FDIC and Debtors, the Court makes the following findings:

1. On the Schedule B-4, the Debtors seek to exempt the following property:

Personal Service Earnings

| | |
|---|---|
| James A. Coones | $30,022.93 |
| Cindy Lee Coones | 793.50 |
| Three Head of Horses | 75% |
| Twenty Yearling Heifers | 75% |
| 160 Head of Cows | 75% |
| 5 Head Cows and Small Calves | 75% |
| 100 Bushels of Oats | 75% |
| 500 Bushels of Barley | 75% |
| 1,000 Bushels of Wheat | 75% |
| 37 Ton of Straw in New Stacks | 75% |
| 60 Ton of Three Year Old Straw - Round Bales | 75% |

| | |
|---|---|
| 60 Ton of Three Year Old Straw - Round Base | 75% |
| 10 Ton of Three Year Old Straw - Round Bales (36) | 75% |
| 4 Ton of Wheat Hay in Stacks | 75% |
| 21 Ton of Three Year Old Alfalfa Hay | 75% |
| 8 Ton of Three Year Old Wheat Hay | 75% |
| 7 Ton of Wheat Hay Round Bales | 75% |
| 5 Ton of Wheat Hay (10 Bales) | 75% |
| 48 Ton of One Year Old Wheat Hay - Round Bales (80 Bales) | 75% |
| 4 Ton of Stacks | 75% |

2. In support of the exemptions, the Debtors cite Lingle State Bank v. Podolak, 740 P.2d 392 (1987).

3. The Court having reviewed that case finds that Lingle does not allow the Debtors to claim exemptions on the property set forth in Paragraph 1 above.

4. Lingle cannot be relied upon to allow the Debtors the exemptions to which they claim they are entitled to. The court in Lingle was interpreting 1-17-411 Wyo. Stat. 1977, 1986 Cumm. Supp. Since that decision was rendered that statute has been amended and completely rewritten. Furthermore, since that court decision, the statutes now contain a definition for personal earnings, a definition which did not exist at the time of the Lingle decision. The new definition of personal earnings does not include those items in Paragraph 1 above which the Debtors seek to exempt.

In light of the findings above, THE COURT HEREBY ORDERS:

1. No exemptions can be claimed on the following property:

Personal Service Earnings

| | |
|---|---|
| James A. Coones | $30,022.93 |
| Cindy Lee Coones | 793.50 |
| Three Head of Horses | 75% |
| Twenty Yearling Heifers | 75% |
| 160 Head of Cows | 75% |
| 5 Head Cows and Small Calves | 75% |
| 100 Bushels of Oats | 75% |
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| 37 Ton of Straw in New Stacks | 75% |
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| 8 Ton of Three Year Old Wheat Hay | 75% |
| 7 Ton of Wheat Hay Round Bales | 75% |
| 5 Ton of Wheat Hay (10 Bales) | 75% |
| 48 Ton of One Year Old Wheat Hay - Round Bales (80 Bales) | 75% |
| 4 Ton of Stacks | 75% |

DATED this 16th day of May, 1989.

BY THE COURT:
s\Harold L. Mai
United States Bankruptcy Judge

APPROVED AS TO FORM:

By: _____
Stephen R. Winship, Esq.
Attorney for Debtors

By: s\Jeanne R. Lee
Jeanne R. Lee, Esq.
Attorney for the FDIC

Wyo. Stat. §1-15-408(a)(b)

(a) A writ of post judgment garnishment attaching earnings for personal services shall attach that portion of the defendant's accrued and unpaid disposable earnings, specified in subsection (b) of this section. The writ shall direct the garnishee to withhold from the defendant's accrued disposable earnings the amount attached pursuant to the writ and to pay the exempted amount to the defendant at the time his earnings are normally paid. Earnings for personal services shall be deemed to accrue on the last day of the period in which they were earned or to which they relate. If the writ is served before or on the date of the defendant's earnings accrue and before the same have been paid to the defendant, the writ shall be deemed to have been served at the time the periodic earnings accrue. If more than one (1) writ is served, the writ first served shall have priority.

Notwithstanding any other provision of this subsection, an income withholding order for child support obtained pursuant to W.S. 20-6-201 through 20-6-222 shall have priority over any other garnishment.

(b) The maximum portion of the aggregate disposable earnings of an individual which are subject to garnishment is the lesser of:

(i) Twenty-five percent (25%) of defendant's disposable earnings for that week; or

(ii) The amount by which defendant's aggregate disposable earnings computed for that week exceeds thirty (30) times the federal minimum hourly wage prescribed by the Fair Labor Standards Act of 1938, 29 U.S.C. 205(a)(1), in effect at the time the earnings are payable, or, in case of earnings for any pay period other than a week, any equivalent multiple thereof pre-scribed by the administrator of the Wyo-ming

Uniform Consumer Credit Code in the manner provided by W.S. 40-14-505(b)(iii).